

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

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| Illinois Power Company d/b/a AmerenIP       | : | 08-0291 |
| and Ameren Illinois Transmission Company:   | : |         |
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|   | : |         |
| Illinois Power Company d/b/a AmerenIP       | : | 08-0449 |
| and Ameren Illinois Transmission Company:   | : |         |
|   | : |         |
|   | : | (Cons.) |
| Petition for an Order pursuant to Section   | : |         |
| 8-509 of the Public Utilities Act Approving | : |         |
| Petitioners' Use of Eminent Domain Power.:  | : |         |

**BRIEF ON EXCEPTIONS OF THE STAFF  
OF THE ILLINOIS COMMERCE COMMISSION**

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Pursuant to Section 200.830 of the Illinois Commerce Commission's ("Commission") Rules of Practice, 83 Ill. Adm. Code 200.830, Staff of the Illinois Commerce Commission ("Staff"), by and through its undersigned counsel, respectfully submits this Brief on Exceptions to the May 8, 2009 Administrative Law Judge's Proposed Order ("Proposed Order") issued in this proceeding initiated by Illinois Power Company, d/b/a AmerenIP ("Ameren" or the "Company") and Ameren Illinois Transmission Company (jointly, "Petitioners"). In the instant proceeding, Petitioners requested an Order pursuant to Section 8-509 of the Illinois Public Utilities Act (the "Act"), 220 ILCS 5/8-509, approving the use of eminent domain to acquire rights-of-way across certain parcels of land on Commission-approved routes for two new 345 kilovolt electric transmission lines.

Consistent with its position throughout the instant proceeding, Staff takes exception to the Proposed Order with respect to: (1) the inconsistent approach the Commission has taken in its consideration of requests for eminent domain authority; (2) the failure to order Ameren to file simultaneous requests under Sections 8-406, 8-503 and 8-509 of the Act; and (3) the determination that Ameren has made reasonable attempts to acquire the outstanding easement rights.

**I. THE PROPOSED ORDER FAILS TO RECONCILE THE INCONSISTENT APPROACH THE COMMISSION HAS TAKEN IN EMINENT DOMAIN PROCEEDINGS**

An entire section of the Proposed Order is devoted to two recent Orders issued by the Commission in Docket Nos. 06-0706 and 07-0532, which are used as support for the Commission's conclusions in the instant proceeding. (Proposed Order, pp. 10-11) Unfortunately, the two Orders were issued after Staff filed its Initial and Reply Briefs in the instant proceeding, thereby rendering it impossible for Staff to have even considered, no less commented upon, their effect on the instant proceeding.

In addition to the fundamental unfairness of this approach, it ignores the issue that Staff has injected throughout this proceeding regarding the inconsistency in the way that the Commission has treated eminent domain proceedings. On the one hand, in Docket Nos. 06-0706, 07-0532 and 08-0291/08-0449 (Cons.), the Ameren Illinois Utilities were allowed to sequentially file Section 8-406/8-503 and 8-509 proceedings. On the other hand, other utilities have been granted eminent domain authority without even making an eminent domain request pursuant to Section 8-509 of the Act. (See Staff's Initial Brief, pp. 7-11) While the Proposed Order highlights the consistency in its Orders in the three recent Ameren Illinois Utilities proceedings, it does nothing to

reconcile the inconsistency with the other proceedings in which the Commission provides automatic grants of eminent domain authority, especially the two recent Commonwealth Edison Company proceedings, Docket Nos. 05-0188 and 07-0310. As such, there will continue to be uncertainty and confusion regarding the treatment of eminent domain proceedings at the Commission.

Since the Proposed Order's Section VI., titled "Orders in Docket Nos. 06-0706 and 07-0532," is not only procedurally flawed but also fails to reconcile the inconsistent approach the Commission has taken in eminent domain proceedings, Staff recommends that it be deleted in its entirety.

## **II. THE PROPOSED ORDER ENCOURAGES AMEREN TO MANIPULATE THE PROCESS TO THE DETRIMENT OF LANDOWNERS**

The Proposed Order does not require Ameren to seek relief under Sections 8-406, 8-503, and 8-509 in the same docket. (Proposed Order, p. 14) Staff maintains that by allowing Petitioners to pursue a stand-alone Section 8-509 proceeding, the Proposed Order encourages public utilities and common carriers to manipulate the eminent domain process at the Commission to the detriment of landowners.

Historically, relief pursuant to Section 8-509 of the Act has been sought at the very same time and in the very same docket as relief pursuant to Section 8-503 of the Act. In fact, there is a 1919 Illinois Supreme Court case that explicitly holds that the only reason Section 8-509 exists is to make Section 8-503 Orders effective. *Public Service Co. of Northern Illinois v. Recktenwald*, 290 Ill. 314, 320 (1919) ("*Recktenwald*"). As a result, the instant stand-alone Section 8-509 proceeding before the Commission would have no purpose other than making effective the Commission's

Section 8-503 Order granted in Docket No. 06-0179. (See Staff's Initial Brief, pp. 2-4) Notably, the Proposed Order fails to mention, let alone address, the *Recktenwald* holding. Staff presumes the historic holding is ignored by the Proposed Order because it irrefutably supports Staff's position that Petitioners' Section 8-509 proceeding should be filed simultaneously with their Section 8-406/8-503 proceeding.

Staff believes that a stand-alone Section 8-509 proceeding, as sanctioned by the Proposed Order, encourages Ameren to manipulate the eminent domain process at the Commission to the detriment of landowners. It is likely that landowners are unaware of the significance of Section 8-406 and 8-503 proceedings at the Commission in terms of the potential taking of their property. They are aware of the significance of a Section 8-509 "Eminent Domain" proceeding, however. But when landowners participate in a stand-alone Section 8-509 eminent domain proceeding such as Petitioners have filed, their participation is less meaningful because issues regarding route, design, construction schedule, and need have already been resolved in the Section 8-406/8-503 proceeding. Allowing Ameren to segregate the Section 8-509 from the Section 8-406/8-503 proceeding creates a loop-hole which Ameren can use to discourage or minimize landowner participation. (See Staff's Initial Brief, pp. 9-10; Staff's Reply Brief, p. 2)

Staff believes that the potential for manipulation of eminent domain proceedings at the Commission must be immediately stopped or it will continue. Staff recommends that the Commission instruct Ameren and future applicants for Certificates of Public Convenience and Necessity under Section 8-406 and for authority under Section 8-503 to make their requests simultaneously and to accompany their requests with requests for Section 8-509 eminent domain authority. These instructions will clarify the

procedure to all participants involved, reduce the possibility that landowners are not fully aware of the consequences of a Section 8-406 or 8-503 proceeding, and give landowners a full opportunity to participate in the process. (See Staff's Initial Brief, pp. 11, 17; Staff's Reply Brief, p. 3)

Since the Proposed Order disregards long-standing Illinois Supreme Court precedent and ignores the favorable aspects of simultaneous relief pursuant to Sections 8-406, 8-503, and 8-509 of the Act to the detriment of landowners, Staff recommends modifications to the Proposed Order not only to accurately reflect Staff's Position but also to arrive at the appropriate Commission Conclusion.

### **III. THE PROPOSED ORDER INAPPROPRIATELY FINDS "REASONABLE ATTEMPTS" HAVE BEEN MADE BY AMEREN**

The Proposed Order further distorts the eminent domain process at the Commission by finding that Petitioners have made "reasonable attempts to acquire the outstanding easement rights through the negotiation process." (Proposed Order, p. 14) As Staff has argued, there is no reference in the Act to the concept "reasonable attempts to acquire" property. However, the requirement is found in Appendix A of the Commission's rules at 83 Ill. Adm. Code 300.10 *et seq.* and provides clarification regarding a Section 8-503 proceeding – not a Section 8-509 proceeding. It not only makes sense to consider "reasonable attempts to acquire" the property in a Section 8-503 proceeding but also encourages a petitioner to commence early discussions with landowners. Since Petitioners' Section 8-503 request was made in Docket No. 06-0179, a determination regarding whether "reasonable attempts to acquire" the necessary easements should have been made in that proceeding, and not in the instant

proceeding. (See Staff's Initial Brief, pp.13-18; Staff's Reply Brief, pp. 3-4)

Moreover, the Proposed Order's finding that "the record indicates that Petitioners" have "made reasonable attempts to acquire the outstanding easement rights through the negotiation process" (Proposed Order, p. 14) appears to be solely supported by Petitioners' self-serving statements. Staff urges the Commission not to set this type of precedent.

Accordingly, Staff recommends modifications to the third paragraph on page 14 of the Proposed Order.

#### **IV. STAFF'S PROPOSED REPLACEMENT LANGUAGE**

Consistent with Staff's exceptions herein, Staff suggests the following replacement language for pages 8 through 14 of the Proposed Order:

##### **B. Staff's Position**

Staff recommends that the Commission grant Section 8-509 authority to Ameren with respect to the outstanding parcels. However, Staff takes issue with Ameren on some aspects of the scope and purpose of the proceeding.

Staff believes that the instant proceeding is the first stand-alone Section 8-509 proceeding at the Commission, since as far as Staff can determine, all previous Section 8-509 requests have been filed along with Section 8-503 requests. In fact, historically, Sections 8-503 and 8-509 of the Act (formerly, Sections 50 and 59, respectively) have never been separate. In *Public Service Co. of Northern Illinois v. Recktenwald*, 290 Ill. 314, 320 (1919) ("*Recktenwald*"), the Illinois Supreme Court specifically held that the only reason Section 8-509 exists is to make effective the Commission's Section 8-503 Order. As such, Staff maintains that Section 8-509 proceedings before the Commission, such as those filed by Petitioners, would have no purpose other than making effective the Commission's Section 8-503 Order in Docket No. 06-0179. Staff believes that the language in the applicable portion of Section 8-509 of the Act is quite clear: a proceeding to apply for eminent domain authority at the Commission would be limited to making a determination as to whether the Commission has entered an Order under Section 8-503 of the Act. Staff

contends that a petition for Section 8-509 eminent domain authority would simply need to reference the prior Commission Order issued pursuant to Section 8-503 of the Act. (Staff Initial Brief at 34-5)

\* \* \*

**~~VI. ORDERS IN DOCKET NOS. 06-0706 and 07-0532~~**

~~— The Commission notes that it recently addressed many of the issues raised by Staff and Ameren in Docket No. 06-0706. The Commission's March 11, 2009 Order granted a certificate pursuant to Sections 8-406 and 8-503 of the Act.~~

~~— In Docket No. 06-0706 the Commission found that a petitioner should not be required to seek relief under Sections 8-406, 8-503, and 8-509 simultaneously. The Commission stated that although situations may exist when doing so is appropriate, situations when it would not be practical are also imaginable. The Commission was not persuaded that utilities should be required to take the serious step of seeking to take property before they are even certain what route their facility will follow.~~

~~— To assure that landowners are fully apprised of the potential impact to their land, regardless of which of the three sections of the Act relief is sought under, the Commission found that additional language should be used in future notices sent by the Chief Clerk pursuant to Section 200.150(h) of 83 Ill. Adm. Code 200, "Rules of Practice." The Commission indicated that while landowners currently receive sufficient notice, the added language would provide landowners with additional information and thereby address at least some of Staff's concerns. The Commission emphasized that it welcomes and appreciates the input of landowners.~~

~~— In another recent Ameren transmission line proceeding, Docket 07-0532, the Commission concluded, in part, on pages 13-14 of its Order of May 6, 2009:~~

~~Furthermore, this Commission does not agree with Staff's argument that issuing an order pursuant to 8-503 in essence guarantees eminent domain against landowners and further rejects Staff's argument that in a later 8-509 proceeding the utility company need only reference the prior Commission order under Section 8-503 to receive eminent domain. To the contrary, the Commission believes that an 8-503 order does not conclusively render a later 8-509 proceeding a mere formality in obtaining eminent domain against property owners. First, no where under Section 8-~~



~~503 does it contain language as to eminent domain and therefore, should not be inferred to include such language. Second, AmerenCIPS has not requested or made a showing for eminent domain authority. Furthermore, if it were AmerenCIPS intent to receive eminent domain, it must make this request under Section 8-509. At which time, AmerenCIPS must establish that proper negotiations have been made with landowners in addition to satisfying this Commission that the construction of facilities is necessary. To emphasize the above, this Order does not constitute a grant of eminent domain authority. This conclusion is consistent with the Commission's recent order in Docket No. 06-0706.~~

## **VII. COMMISSION ANALYSIS AND CONCLUSIONS**

By way of background, it is noted that the Commission entered an Order in Docket 06-0179 on May 16, 2007, granting a Certificate of Public Convenience and Necessity to AmerenIP and Ameren Illinois Transmission Company pursuant to Section 8-406 of the Public Utilities Act. The Certificate authorized the construction and operation of three 345 kV electric transmission lines, totaling approximately 38 miles in length, over the routes approved therein. There were numerous intervenors in the case, many of whom were landowners over whose property the transmission lines would extend.

The lines will be used to interconnect Ameren's high voltage transmission system with a 1,650 megawatt coal-fired generating station, known as the Prairie State Facility, being constructed near Marissa in Washington County.

As stated in the Order in 06-0179, Petitioners also requested that the Commission "authorize construction of the Project pursuant to Section 8-503 of the Act." Section 8-503 provides, in part:

Whenever the Commission ... shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility ... are necessary and ought reasonably to be made or that a new structure or structures is or are necessary and should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such additions, extensions,

repairs, improvements or changes be made, or such structure or structures be erected....

In the findings and ordering paragraphs, the Order in 06-0179 authorized Ameren “to construct the Project pursuant to Section 8-503 of the Act.”

In 06-0179, Staff recommended that the order also grant eminent domain-related relief pursuant to Section 8-503, by specifically finding that the order “will in effect authorize Petitioners to enter upon, take, or damage private property, in the manner provided for by the law of eminent domain . . . .” (06-0179, Exc. at 9) However, Petitioners opposed such a finding, observing that it would be premature. They noted that eminent domain authority was not being sought in 06-0179 because negotiations with landowners were ongoing. (06-0179, RBOE at 5-6) Petitioners stated that if they were to subsequently determine there was a need to condemn certain parcels of property in order to construct the Project, they would seek Commission approval to exercise eminent domain authority in a separate proceeding.

Accordingly, in 06-0179, the Order did not make findings as to whether Petitioners had engaged in diligent, good faith negotiation efforts with landowners or had made reasonable attempts to acquire the necessary land rights through negotiations with landowners. Similarly, the Order did not adopt the finding, proposed by Staff, that the order “will in effect authorize Petitioners to enter upon, take, or damage private property, in the manner provided for by the law of eminent domain . . . .” Instead, the Order found that if Petitioners later determined there is a need to seek eminent domain, they will need to obtain Commission authorization before doing so. (Order at 40)

~~Similar findings were made in the Commission’s recent 8-406/8-503 Order in another Ameren electric transmission line case, 06-0706, entered March 11, 2009. There the Commission observed, on page 88, that “[p]etitions filed under Sections 8-406 and, particularly, 8-503 do not contain some implicit request for eminent domain authority and should not be read as such”, and that “[a]ny petitioner seeking eminent domain authority must specifically request such relief under Section 8-509 in its petition.”~~

~~The Commission also made similar findings in its Order of May 6, 2009 in another Ameren transmission line proceeding, Docket 07-0532.~~

Subsequent to the entry of the Order in 06-0179, Ameren continued to pursue its negotiation efforts with landowners. Eventually, easements for many, but not all, of the tracts along the approved routes were

obtained through the negotiation process.

Therefore, in the **instant dockets**, 08-0291 and 08-0449, Ameren filed a petition pursuant to Section 8-509 of the Act for an order approving the use of eminent domain with respect to the parcels, on two of the lines certificated in 06-0179, for which Ameren had been unable to obtain easement rights through the negotiation process. Section 8-509 provides, in part:

When necessary for the construction of any alterations, additions, extensions or improvements ordered or authorized under Section 8-503 or 12-218 of this Act, any public utility may enter upon, take or damage private property in the manner provided for by the law of eminent domain.

In its petitions in 08-0291 and 08-0449, Ameren alleges that it has attempted to obtain the remaining easements through diligent good-faith negotiation efforts, but has been unsuccessful in doing so. In support of its petition, Ameren filed testimony describing such efforts; Ameren also filed testimony regarding the route, design and schedule of the line. This testimony was offered in support of its assertion that eminent domain relief is necessary within the meaning of Section 8-509. Staff's motion to strike such evidence as irrelevant was denied, and the ruling was upheld by the Commission on review.

In filings made in 08-0291 and 08-0449, the Commission Staff "recommend[s] that the Commission grant Petitioners eminent domain authority for the . . . line." (Affidavit at 2; Staff brief at 17) Staff recommends that such authorization be limited specifically to the parcels listed on Ameren Exhibits 4.0PW (Revised), p. 2 and 4.0BR (Revised), pp. 2-3.

Staff also recommends that the Commission require Ameren and other future applicants seeking Certificates under Section 8-406 and authority under Section 8-503 "to make their requests simultaneously and to accompany their requests with requests for Section 8-509 eminent domain authority." (Staff brief at 17)

~~Staff made the same request in Docket 06-0706, proposing that petitioners be required to seek relief under all three Sections, 8-406, 8-503 and 8-509, simultaneously. Ameren opposed the recommendation; Ameren observed, among other things, that it did not seek eminent domain relief in its Section 8-406/8-503 petitions, and that filing an 8-509 petition later rather than simultaneously allowed it to conduct additional negotiations with landowners before seeking eminent domain relief under 8-509.~~

~~In its Order in 06-0706, entered March 11, 2009, the Commission rejected Staff's proposal that petitioners be required to seek relief under Sections 8-406, 8-503, and 8-509 simultaneously. There, the Commission expressly found that "a petitioner need not seek relief under Sections 8-406, 8-503, and 8-509 simultaneously." In rejecting Staff's proposal in 06-0706 to require petitioners to seek relief under 8-406, 8-503, and 8-509 simultaneously, the Commission found, among other things, that holding an 8-509 proceeding after land negotiations may better serve landowners.~~

~~In agreement with Staff, the instant case, the Commission again finds, just as it did on March 11, 2009 in 06-0706, that in all future proceedings petitioners should not be required to seek relief under Sections 8-406, and 8-503, and simultaneously with relief under Section 8-509 in the same docket. This approach is consistent with the 1919 Illinois Supreme Court holding in the *Recktenwald* case, so aptly cited by Staff. Although a simultaneous approach may be appropriate in some instances, Moreover, the Commission believes a sequential simultaneous approach can be of provides benefits to landowners (i.e., improves the transparency of the proceeding, provides a full and complete record, allows more efficient use of landowners' resources, etc.) that far surpass any benefit derived from a sequential approach because of the additional negotiation opportunities afforded to them.~~

~~With regard to Staff's concerns regarding meaningful notice to landowners in future cases, the Commission notes that in 06-0706, the Commission found that additional language should be used in future notices to landowners sent by the Chief Clerk pursuant to Section 200.150(h) of 83 Ill. Adm. Code 200. Such language is intended to assure that landowners are fully apprised of the potential impact to their land, regardless of which of the three sections of the Act relief is sought under. In the instant case, the Commission again observes that the added language required by the Order in 06-0706 will provide landowners with additional information, thereby addressing some of Staff's concerns.~~

~~Regarding whether the Petitioners in the instant cases have made reasonable attempts to acquire the outstanding easement rights through the negotiation process, the Commission finds that while this issue may be relevant to a proceeding brought pursuant to Section 8-503 of the Act, it is not relevant to the instant Section 8-509 proceeding. As such, no finding in this regard will be made herein. record indicates that Petitioners have done so and that despite such efforts, Petitioners have been unable to obtain the remaining easements. As the Commission indicated on page 14 of in its Order of May 6, 2009 in Docket 07-0532, "[I]f it were AmerenCIPS' intent to receive eminent domain, it must make this request under Section 8-509..., [a]t which time, AmerenCIPS must establish that~~

~~proper negotiations have been made with landowners . . . .”~~

In conclusion, the Commission finds that since the Commission has the easement rights sought by Petitioners are necessary for the construction of the lines previously authorized the construction of these lines under Sections 8-406 and 8-503, and that relief pursuant to Section 8-509 should be granted, thereby allowing Petitioners to seek eminent domain in court. As recommended by Staff, the relief granted herein is limited specifically to the parcels listed on Ameren Exhibits 4.0-PW (Revised) at 2 and 4.0BR (Revised) at 2-3. Additionally, the Commission finds that Petitioners no longer need nor seek eminent domain authority with respect to the property owned by Dynegy; therefore, the relief granted herein does not include the property owned by Dynegy.

## V. CONCLUSION

For the foregoing reasons, Staff of the Illinois Commerce Commission respectfully requests that the Commission modify the Proposed Order consistent with Staff's recommendations herein.

Respectfully submitted,

A handwritten signature in black ink that reads "Linda M. Buell". The signature is written in a cursive, flowing style.

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